

**In The United States Court of Appeals**  
**For the Ninth Circuit**

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SAMUEL H. PALMER and C. A. WHITE, Partners Doing  
Business as WESTERN FENCE & WIRE WORKS,  
*Appellants,*

— vs. —

KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE  
WORKS Co., a Corporation, *Appellees.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

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**BRIEF OF APPELLEES**

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FILED JUL 14 1950

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<p>SAMUEL H. PALMER and C. A. WHITE, Partners Doing Business as WESTERN FENCE &amp; WIRE WORKS,   <i>Appellants,</i></p> <p style="text-align: center;">vs.</p> <p>KARL H. KAYE, MATILDA KAYE and PACIFIC WIRE WORKS Co., a Corpora- tion,                                   <i>Appellees.</i></p>	}	No. 12495
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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON  
NORTHERN DIVISION

### BRIEF OF APPELLEES

#### STATEMENT OF FACTS

The complete restatement of all the facts seems unnecessary, but there are so many inaccuracies in the statement in appellants' brief that it seems desirable to deal at some length with some of the facts. They will be discussed at greater length in the several divisions of the argument.

The appellants in the Palmer patent claimed that the screen had "*a practically flat or smooth side*" (R. 324); that "the flat surface" was particularly adapted for screening exceptionally tough or abrasive substances; that the screen comprised "two sets of rods, one set being arranged at right angles to the other set, and each rod being composed of a plurality of *uniformly curved elongated arches* and relatively short

and *gradually formed shallow crimps* connecting the arches together" (R. 325). Again, the arches are referred to as "gradual longitudinal arches," "the terminals of adjacent arches defining relatively shallow crimps" (R. 325). Mr. Palmer, in answer to questions by the court, said (R. 95):

"The arch, the combination of the short crimp and the arch, is what the patent really is."

It is clear in the evidence that the arch and crimp have long been known to the art (Lippincott, R. 141-142; Dobson, R. 152; Kaye, R. 203). There is nothing new in them. Both were shown in the grill or window screen which was put in the Olympic Hotel in Seattle about the year 1924. Both appear in the Tyler catalogue of 1927 (Defendants' Exhibit A-36, pages 80, 82, 85, 86, 89, 90, R. 252-255). In 1915 W. S. Potter secured a patent, No. 1139469, on a screen with a substantially flat wearing surface. In this respect it was similar to the claim of the Palmer patent. The Potter screen has crimps in which every other transverse wire rests, and between the crimps there is a comparatively flat connecting link. These crimps are deeper than the crimps in the Palmer patent, but contrary to the statement in appellants' brief, they are not right-angled crimps. As appears from Figure I and Figure II of the Potter patent (R. 327), they are rounded crimps approaching an angle of 45 degrees. The court will note, however—and this is very important—that those crimps do give very considerable support to the transverse wires in the prevention of shifting and very much more support than the transverse wires receive from the shallower crimps in the Pal-



mer patent. Appellants' brief constantly exaggerates the so-called sharpness of the Potter crimps and overlooks the much greater support which the crimps in the Potter patent give to the transverse wires.

Appellants' brief insists that a defect in the screen made from the Potter patent is the greater likelihood of shifting of the wires. The testimony, however, establishes that if the Potter screen is properly manufactured, it will be a firm screen, and this shifting will not occur (Lippincott, R. 145; Guess, R. 162; Kaye, R. 203, 209). In addition to the support which the wires in the Potter screen receive from the crimps in which they rest, their stability is also secured by the springiness of the wire woven under pressure.

Screens under the Potter patent were not only manufactured and sold prior to the time of the Palmer patent but have been manufactured at all times since and are still being manufactured and sold in large quantities.

The appellees' screens, while not exactly like the Potter screens, are similar (R. 215). The crimps in appellees' screens are somewhat shallower than those in the Potter screens and somewhat less in depth so that the transverse wires passing under the connecting links are pressed up more firmly against the wire above them and held in place. Mr. Kaye's testimony is that they have had no trouble from the shifting of wires in the mesh (R. 203). He has sold his screens in competition with appellants' screens for federal government work (McNary Dam, R. 260; Hungry Horse Dam, R. 266; Coulee Dam, R. 266).

As Palmer himself testified, he did not notify Kaye that he was infringing his patent until appellees' competition became keen and substantial (R. 112). Appellants' patent was applied for in 1934 and granted in 1937. The Palmer screen has been on the market some sixteen years. The business done by appellants is largely in the Northwest. The Palmer screen has not displaced other types of screen. It has not made any large dent in the market. Palmer has not a single licensee (R. 115). Manufacturers have shown no anxiety to get the benefit of his asserted improvements. He has at the present time, after the screen has been on the market for sixteen years, but fourteen employees, including the office girl (R. 99). The other manufacturers, who are very much larger, have done and continue to do the very great bulk of the business. They manufacture the Potter and Galloway screens, all of the "flat top" type. Clearly, there has been no such immediate commercial success of the appellants' screen to indicate any invention or novelty or any superior quality.

We do not agree that the questions listed in appellants' brief on page 2 are the questions presented by the evidence in this case. The evidence does not establish the overall desirability of what is claimed to be the Palmer invention. The word "desirable" is not a word customarily used in patent law, but if used, it must mean desirable in the sense that the merits offset and outweigh the demerits (R. 207). The evidence in this case overwhelmingly established the fact that the Palmer screen was not an overall improvement over the then existing screens and not an overall

improvement over the Potter or the Galloway screens (See the testimony of Joseph E. Lippincott, designer and assistant staff engineer with the Roebling Company, having been with that large manufacturing company for forty-seven years (R. 145)); of Duncan C. Dobson, president of the Ludlow-Saylor Wire Company, which has been in the manufacturing and sale of woven wire screens for fifty-four years (R. 152-153); and Frank M. Guess, manager of the Abbey-Sherer Company of El Monte, California (R. 162). This matter will be referred to later in the discussion of utility.

The evidence also establishes that the arch to which Mr. Palmer refers was well known to screen manufacturers prior to the time of his patent and that it was, so far as practicable, intentionally removed or eliminated by them because they considered it undesirable (R. 144, 161). Since the arch was known to them, it is impossible to assume that they did not also observe the slight lateral support which would be given in the smaller meshes to the transverse wires by the arches. Any mechanic or layman would have observed that readily.

The evidence clearly establishes that the distinguishing features of the "flat top" type of screen are the presence of all the crimps on the under or lower sides of the screens and a comparatively flat surface on the top side (R. 144, 149, 193). These are exactly the claims of the Palmer patent. Under that definition the screens manufactured by appellants and appellees and under the Potter and Galloway patents and by all of the concerns, whose officials testified in the cause, are "flat top" type screens.

Appellants state in their brief that appellees sold their screen under the name of "Pacific 4S Flat Top." This is not true. Appellees' screens are sold as "Pacific 4S" (R. 167). They are claimed to be, and are, under the accepted definition, a "flat top" type of screen. None of the manufacturers mentioned in the evidence sell their screens as "flat tops" because that term is a trade mark belonging to the Abbey-Scherer Company. All of them, however, do refer to their screens as of the "flat top" type (R. 159).

Prior to the development of the "flat top" type of screen, a double crimp type, which has crimps both on the lower and upper surfaces, was common. For certain uses, such as the screening of hard rock, the double crimp style was not so serviceable because it exposed too much of a wearing surface to the sharp rock, but the double crimp type of screen is still in wide use in the smaller meshes, and for some operations it is still better than the "flat top" type.

The Potter screen, which preceded the Palmer screen, had the advantage over previous screens of the comparatively flat wearing surface, giving it, for that reason, a longer life.

It is not true that the sharper bends in the crimps of the Potter screen were a disadvantage if spring steel wire was used, for there are different types of spring steel wire, and, if the proper type is used in the making of the Potter screen, there is no tendency to weakness or fracture of the wire in the crimps. Nor is it true that if properly manufactured, there is a shifting of the cross-wire (R. 203, 162, 145). It is

true that support can be given to the cross-wire by a nick and some lateral support is given *in the smaller meshes* by the slight and unavoidable natural curve between the crimps. This is not necessary, however, as appellees' manufacture proves, if friction between the wires is insured by pressure secured through the springiness in the wire by making the depth of the crimp somewhat less than the diameter of the wire. This pressure itself really produces a slight nick or indentation in the wire (R. 203). The nick, of course, is not patented, was known long before appellants' patent (R. 255-256), and is a device which any mechanic would readily think of. Appellees and Ludlow-Saylor do not employ it because they have found it unnecessary. But there is nothing to prevent them if they wished to do so. It would provide any additional needed lateral support, not only in the  $1\frac{1}{2}$ " opening, but also in the larger openings where appellants' arch is flattened out so much as to provide no support.

It is now admitted by the appellants that appellees' screens of the wider meshes do not infringe their patent. This admission was forced by the overwhelming proof that in these wider meshes there was nothing which could possibly be called an arch between the crimps, and there was no support given to the intersecting wires. Although the appellants make screens ranging from  $\frac{7}{16}$ " mesh up to as high as 6" (R. 80), they did not, during the course of the four-day trial, introduce in evidence any other than their  $1\frac{1}{2}$ " mesh (Plaintiffs' Exhibit 3), except an old worn out screen (Plaintiffs' Exhibit 6). The appellees, on the other hand, whose range runs from  $1\frac{1}{4}$ " up to 4"



only, introduced a number of wires from their screens. Contrary to appellants' contention, these wires were fully formed. They were not made particularly for this trial, but were the ends of wires which had been actually used in the manufacture of screens. The fact is that the individual wires demonstrated more clearly their exact shape than the wires in the screens. The witnesses for the appellees testified that appellees did not form-pattern the connecting link in their dies so as to create any arch or bow (R. 206); that in the making of the crimps by the plunger of the punch, a natural arch between the crimps would be formed unless prevented, and steps were taken to eliminate it so far as possible (R. 229, 206). The larger meshed screens clearly demonstrated that any so-called arch had been entirely eliminated. It is true that in the weaving process in appellees' screens, in order to secure pressure between the intersecting wires, a slight distortion upward in the connecting link is produced (R. 199). This, however, is not a result of the *manufacturing* process but a natural result of the *weaving* process and is for the purpose of securing a firm mesh.

In the pleadings and throughout the trial of the case, the appellants contended that all of appellees' screens infringed the Palmer patent. It was not until the argument and motion for a new trial that counsel for appellees confined their claim to the 11½" mesh (Plaintiffs' Exhibit 2). In their brief (page 54), they have now enlarged this claim to include "any other screens having the same form as shown in Palmer's patent," and they urge that the determination of what other screens do infringe should be left to the

Master in fixing damages. This would be conferring on the Master authority to pass on one of the fundamental questions of fact which was submitted to the lower court and when there are no screens of the appellants in evidence except the 1½" mesh. That situation was created by the appellants voluntarily. By express stipulation drawn by counsel for appellants, and approved by the court (R. 13-14), the question of infringement has been tried out and decided against appellants. They did not choose to exhibit to the lower court their screens with the larger meshes—and for obvious reasons. They would have shown beyond all doubt that the appellants' claims were not sustained in those sizes. By stipulation the question of infringement was expressly left with the court. The evidence on that question is in. It cannot be reopened before a Master.

Appellees contend that, although they do not intentionally create any arches and do not desire them, they *naturally* tend to form and are more apparent as the meshes grow smaller. When you arrive at the 1½" mesh, the necessary crimps are so close together and the connecting link between the crimps is so small that it may, on hasty inspection, appear to present a continuous curve. If you are to have crimps, this cannot be avoided. Appellees, however, contend that even in the 1½" mesh there is actually between the adjacent crimps a very small flat connecting link.

There was a dispute at the trial concerning the meaning of the word "crimp." The appellees contended that the crimp included all of that portion of the wire in the indentation made by the plunger below

the plane of the wire at the top of the crimp. For purposes of clarity, it was finally agreed in the lower court that the wire between the crimps as so defined should be termed "connecting link." The appellants endeavored to maintain that the arches extended down the sides of the crimp to the very bottom thereof and that their patent could be described properly as a series of intersecting arches. The evidence shows, however, that this is entirely inaccurate. The arches do not intersect. If they did, there would be produced a sharp point of intersection. The so-called shallow crimp mentioned in their patent would be entirely eliminated. There would be no crimp at all. *This is contrary to the expressed claims of their patent*, which constantly refers to the shallow crimps as something different and distinct from the arches, "Plurality of uniformly curved elongated arches and relatively short and gradually formed shallow crimps connecting the arches together" (R. 325).

Their patent also emphasizes that the arches are *uniformly* curved and elongated. Even in the small meshes, the connecting links in the appellees' screens are not uniformly curved and cannot be properly termed elongated arches. In the larger meshes, it is perfectly obvious that there are no *uniform* curves and nothing which can be properly described as arches in the connecting links between the crimps.

Originally Mr. Palmer testified that in the appellants' manufacturing process, they used dies which predetermined accurately the form of the arch in his screen (R. 76-77). In other words, the appellants intentionally constructed the arch in accordance with the



prepared plans. The appellee, on the contrary, does not, in his manufacturing process, intentionally create any arch or curvature between the crimps. Such arch or curvature as occurs is contrary to his desire and because it cannot be entirely avoided in his method of manufacture.

It is suggested in appellants' brief, although no weight was placed on this matter in the lower court, that screens made under the Potter patent were not sufficiently rough on top to give efficiency in classifying material. There is no evidence, except the interested testimony of Palmer and Essley, to indicate that the Potter screen was in any way defective in this regard. Indeed, the fact that it had been in use for more than thirty-five years, and is still in use without any change in that regard, is the strongest evidence that there is no such disadvantage in its use. The Potter screen is still being made by the largest screen manufacturers in the country, and all of them, including appellants, are striving for a practically flat surface. If a rough surface were desirable at all times, then the Galloway patent, which also preceded the Palmer patent, would be preferable. But, of course, if at any time a rougher surface is desirable, the Potter screen, like the Palmer screen, can be reversed.

All of the manufacturers mentioned in this case now use in their gravel screens spring steel wire of high carbon and high manganese content. All of them, with the exception of Manganese Steel, use the cold press process. Manganese Steel alone employs the heat treatment. There are various types of spring steel wire, and with the proper sort there is no difficulty

in the manufacture of the Galloway screen where the crimps are not abrupt but rounded, or in the manufacture of the Potter screen. The reference to Mr. Lippincott's testimony to support the contrary statement of appellants' counsel misconstrues Lippincott's language; he is there referring to the heat treatment in the manufacture of the wire itself and not in the crimping process (R. 146).

Appellants' counsel, in support of many of their statements, have referred almost exclusively to the testimony of appellant Palmer and his sales manager, Essley. Essley was actively engaged in competing with appellees' products. His experience in connection with the manufacture of woven wire screens was almost entirely as a mere clerk and salesman. The lower court was in a position to determine the credibility of these two interested witnesses. He was entitled to disregard all or any part of their testimony if he saw fit. The appellants produced no independent disinterested witnesses upon the vital points of the case. On the contrary, the appellees did produce three of the most experienced persons in the industry, all totally disconnected with the case and with the appellees.

## ARGUMENT

## I.

**The findings of the lower court are findings of fact which this court will not set aside unless clearly erroneous. The evidence furnishes abundant support to the court's findings.**

All of the findings of the lower court to which the appellants are objecting have been held by this court, as well as many other courts, to be findings of fact. *Faulkner v. Gibbs*, 170 F.(2d) 34, at page 37.

Rule 52 (a) of the Federal Rules of Civil Procedure provides as follows:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness \* \* \*. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.”

That the appellate court should be slow to set aside the findings of fact of the lower court and should not do so unless they are clearly erroneous is not only well established but is being enforced strictly. *United States v. National Association of Real Estate Boards*, Advanced Opinions of the United States Supreme Court, Volume 94, page 714 at page 719. *Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, Advanced Opinions of the United States Supreme Court, Vol. 94, page 767 at 772. *Pendergrass v. New York Life Insurance Co.* (U.S.C.A. 8, April 3, 1950) 181 F.(2d) 136. *Standard Oil Development Co. v. Marzall* (U.S.C.A. D.C.) 181 F.(2d) 280.

In *United States v. National Association of Real Estate Boards* (*supra*), the court, speaking through Mr. Justice Douglas, decided that it could not overrule the lower court in the light of Rule 52(a) simply because it might disagree with that court on the facts. Justice Douglas said:

“It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. We are not given those choices, because our mandate is not to set aside findings of fact ‘unless clearly erroneous’.”

In *Pendergrass v. New York Life Insurance Company* (*supra*) the Circuit Court of Appeals of the Seventh Circuit, facing this same question, said:

“The appellants have misconceived the functions of this court, the jurisdiction of which is appellate. In the case of *Cleo Syrup Corporation v. Coca-Cola Co.*, 8 Cir., 139 F.2d 416, 417-418, 150 A.L.R. 1056, we said: ‘\* \* \* This court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. *Storley v. Armour & Co.*, 8 Cir., 107 F.2d 499, 513; *Gasifier Mfg. Co. v. General Motors Corporation*, 8 Cir., 138 F.2d 197, 199; *Travelers Mutual Casualty Co. v. Rector*, 8 Cir., 138 F.2d 396, 398. The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. *Thompson v. Terminal Shares, Inc.*, 8 Cir., 89 F.2d 652, 655; *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 8 Cir., 113 F.2d 698, 701 (affirmed 313 U.S. 146, 61 S. Ct. 908, 85 L. Ed. 1251); *Travelers Mutual Casualty Co. v. Rector*,

*supra*. In a nonjury case, this court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. *Aetna Life Ins. Co. v. Kepler*, 8 Cir., 116 F.2d 1, 4, 5; *Gasifier Mfg. Co. v. General Motors Corporation*, 8 Cir., 138 F.2d 197, 199; *Travelers Mutual Casualty Co. v. Rector*, *supra*.'

"There is no logical reason for placing the findings of fact of a trial judge upon a substantially lower level of conclusiveness than the fact findings of a jury of laymen, or those of an administrative agency, which may be set aside only if unsupported by substantial evidence. The findings of fact of a trial court should be accepted by this court as being correct unless it can be clearly demonstrated that they are without adequate evidentiary support or were induced by an erroneous view of the law. The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district court, and multiplies the number of appeals in such cases.

"The sufficiency of this evidence to support a trial court's findings and judgment is, of course, a proper question on review. Whether a reviewing court thinks that it would or might have made different findings of fact or have entered a different judgment, had it been the trier of the



facts, is a matter of no consequence. On review, this court should refrain from exercising any of the trial functions conferred by law upon the district courts."

In *Standard Oil Development Co. v. Marzall*, 181 F.(2d) 280, the District of Columbia Court of Appeals had this to say:

"But the scope of our review of the decision of the District Court itself is not an unlimited one. The scope and character of review depend upon the nature of the question reviewed. The problem in the present case, if it can any longer be considered a problem in this court, is whether the District Court's finding of nonpatentability \* \* \* is a finding of fact. If so we may set it aside only if it is clearly erroneous. In *Besser v. Ooms*, 154 F.(2d) 18, this court said: '\* \* \* invention is a question of fact,' from which it followed that, 'A reasonable finding that claims lack invention should not be set aside'."

That court concluded:

"Allowing ourselves the permissible latitude, we cannot say that in the present case the finding of the trial court against patentability is not a reasonable one on the evidence or that it is clearly erroneous. The evidence does not make clear that the combination and improvement admittedly brought about are the product of creative talent which lifts the claims to the level of patentability over and above a prior art which had already disclosed the essentials of the new device."

That the evidence abundantly supports the court's findings we have demonstrated elsewhere in this brief.

Appellants have overlooked the position of this court after a finding of the lower court on the facts that a patent is invalid. On the vital matters in dispute, their references are largely to the testimony of the appellant Palmer and his employee Essley. The appellants produced no independent or expert testimony on those vital points. They disregard the rule that this court will not reverse the lower court on a question of fact if the findings of the lower court have reasonable support in the evidence.

Appellants' counsel bear down heavily on the *prima facie* presumption of validity arising from the grant of a patent. We conceive that this presumption, like other presumptions, loses its force when substantial evidence of invalidity has been introduced. *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 82 Fed. 726 at 730. Like other presumptions, this presumption is not evidence in itself, and the records of the Supreme Court from 1881 to date have shown that the grant of the patent by the patent office has not been allowed much weight, for 86% of all patents coming before the Supreme Court in that period of time have been declared invalid. See article *Patent Law: Why Challenge the Court's View of "Invention"?* by W. Houston Kenyon, Jr., American Bar Association Journal, June 1949, Volume 35, page 480. In that article the author says:

"However desirable it would be to have the decision of the Patent Office final upon the point of validity, the experience of almost a century in this country, and of very nearly the same length of time in the courts of Great Britain and Canada, has shown that unhappily we cannot ac-

cord such weight to the decision of a patent examiner. Patents are obtained *ex parte*. An examiner makes the best search he can in the time available to him for examining each of the many cases for which he is responsible. It is greatly to the credit of the Patent Office, and to the chiefs of its sixty-nine patent examining divisions, that in so large a proportion of cases coming before them they do a surprisingly good job. But no action upon a patent application is any better than the search which lies behind it. As the arts today multiply and expand, searching becomes ever more difficult and slow. Searching, by and large, is the responsibility of the junior examiner, of whom hundreds have newly come to work in the Patent Office since the war. The junior is faced with a classification system in which existing United States patents are arranged by subject-matter in some 43,000 subclasses. As his experience grows he makes up his own further unofficial subclasses in the areas of his responsibility. But only United States patents are included in the general classification system—technical journals and foreign patents, though equally applicable on the issue of patentability, are not classified for him. He must in some way keep abreast of the expanding literature and the large numbers of incoming copies of foreign patents, often poorly indexed or not indexed at all, to keep his own private classes up-to-date. On top of this he is necessarily driven by the volume of work pressing upon him, and has a reputation to make with his superiors for efficiency and dispatch of business.

“Under these circumstances it is hardly to be wondered that a certain number of applications go to issue notwithstanding the existence, undis-



covered by the examiner, of some prior patent or publication which seriously impugns novelty  
\* \* \*.

“In the years immediately preceding the recent war about 40,000 patents issued annually.”

In addition, and since the decision of the earlier cases laying down the rule as the presumption, the Federal Rules of Civil Procedure have been adopted. After an adverse finding by the lower court on the fact, it is difficult to see how this presumption of validity through the issuance of a patent by the Patent Office can any longer be of effect in the Appellate Court in the face of Rule 52(a). In any event, in this case the evidence overcame the presumption and established the invalidity.

## II.

**The basic issue is whether the alleged discovery of the Palmer screen constituted invention.**

The statute reads (35 U.S.C.A., Section 31):

“Any person who has *invented* or *discovered* any *new and useful* art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, \* \* \* not known or used *by others in this country*, before his invention or discovery thereof, \* \* \* may \* \* \* obtain a patent therefor.”

What is invention has been very difficult to define. In *Cuno Engineering Corporation v. Automatic Devices Corp.*, 314 U.S. 84, 86 L. ed. 58, the Supreme Court of the United States said:

“A new device, however useful it may be, must reveal the flash of creative genius, not merely

the skill of the calling, to constitute a patentable invention."

This court in the recent case of *Gomez v. Granat Bros.*, 177 F.(2d) 266, said:

"The element of invention or discovery is an essential requisite of patentability and 'invention' must at least involve the production of something new and useful and the trend of recent controlling decisions is to the effect that invention involves the operation of the intellect or of something akin to genius as distinguished from mere mechanical skill."

citing many cases. This court then quotes with approval from the Supreme Court in *Cuno Engineering Corp. v. Automatic Devices Corp.* (*supra*) as follows:

"We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute 35 U.S.C.A., Section 31, Section 4886, the device must not only be 'new and useful,' it must also be an invention or 'discovery'. *Thompson v. Boisselier*, 114 U.S. 1, 11, 5 S. Ct. 1042, 1047, 29 L. Ed. 76. Since *Hotchkiss' Ex'x v. Greenwood*, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art\* \* \*. That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain." (314 U.S. 48, 62 S. Ct. 40)

In the recent case of *Standard Oil Development Co. v.*

*Marzall*, 181 F.(2d) 280, the District of Columbia Court of Appeals had this to say:

“There is still a further element which must appear, namely, that this combination, though admittedly followed by substantially better results, grew out of that ‘uncommon talent’ which lies at the root of invention in a patentable sense.”

In *Keszthelyi v. Doheny Stone Drill Co.* (1932) 59 F.(2d) 3, this court quoted with approval the following from the opinion of the Supreme Court in *Burt v. Alexander F. Ivory*, 133 U.S. 349 at 358, 33 L. ed. 647:

“It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception, and *a mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention.* In *Smith v. Nichols*, 21 Wall. 112, 118, 119, Mr. Justice Swayne, delivering the opinion of the court, said: ‘A patentable invention is a mental result. It must be new, and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substan-

tially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain, and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large.'

"Neither is it invention to combine old devices into a new article without producing any new mode of operation. *Stimpson v. Woodman*, 10 Wall. 117; *Heald v. Rice*, 104 U.S. 737; *Hall v. Macneale*, 107 U.S. 90, 2 S. Ct. 73.

"In the case of *Klein v. City of Seattle*, 77 Fed. 200, 204, this court said:

" 'A patent must combine utility, novelty, and invention. It may, in fact, embrace utility and novelty in a high degree, and still be only the result of mechanical skill, as distinguished from invention. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof. In the language of the supreme court: 'It is not enough that a thing shall be new, in the sense that, in the shape or form in which it is produced, it shall not have been before known, and that it shall be useful, but it must, under the constitution and statute, amount to an invention or discovery.' *Hill v. Wooster*, 132 U.S. 693, 701 10 S. Ct. 228, 231, and authorities there cited. *A mere difference or change in the mechanical construction in the size or form of the thing used, in order to obviate known defects existing in the*

previous devices, although such changes are highly advantageous, and far better and more efficacious and convenient, does not make the improved device patentable. In order to be patentable, it must embody some new idea or principle not before known. It must, as before stated, be a discovery, as distinguished from mere mechanical skill or knowledge. *Atlantic Works v. Brady*, 107 U.S. 192, 200, 2 S. Ct. 225; *Hollister v. Benedict*, 113 U.S. 59, 5 S. Ct. 717; *Thompson v. Boisselier*, 114 U.S. 2, 11, 5 S. Ct. 1042; *Busell Trimmer Co. v. Stevens*, 137 U.S. 423, 433, 11 S. Ct. 150; *Andrews v. Thum*, 15 C.C.A. 67, 67 Fed. 911.'

"The principles stated in these decisions are well settled and require no further discussion."

The case of *Schick Service v. Jones*, 173 F.(2d) 969 (1949), also a decision by this court, is decidedly in point on the facts and in law. There the court again quoted the language just referred to.

In the late case of *Lane-Wells Company v. Johnston*, 181 F.(2d) 707, this court also said:

"We think that the bringing together of the old elements as was done in the Lane patent did not rise to the level of invention. It did not require more than the exercise of mechanical ingenuity of one skilled in the prior art. The ease and simplicity with which the bringing together of the old elements can be accomplished is illustrated by the method of construction of plaintiff's accused device."

See also *Emmett v. Metals Processing Corp.* (C.C.A. 9) 118 F.(2d) 796. In *Picard v. United Aircraft Corp.* (C.C.A. 2, 1942) 128 F.(2d) 632, that court said:



"We cannot, moreover, ignore the fact that the Supreme Court, whose word is final, has for a decade or more shown an increasing disposition to raise the standard of originality necessary for a patent. In this we recognize 'a pronounced new doctrinal trend' which it is our 'duty,' cautiously to be sure, to follow not to resist."

In the concurring opinion, Judge Frank refers to the Supreme Court's decision sustaining a very small percentage of patents. He says that Judge Hand, who delivered the majority opinion, applies a negative test:

"Nothing is an invention which is the product of 'the slow but inevitable progress \* \* \* through trial and error' and of 'the exercise of persistent and intelligent search for improvement'."

If we apply these principles to the facts in this case, we shall find that they clearly support the lower court's decision. The trial court said that Palmer's claims involved no invention. Admittedly, neither the arch nor the crimp were new. Palmer now claims that it is the combination of the arch and crimp which constitutes a discovery and involves invention. But arches, or bows, whatever they may be called, naturally occur in the production of the crimps. As the court said:

"They are a natural by-product of the crimp."

Unless steps are taken deliberately to remove them, they will occur in every screen. In the manufacture of the Potter screen, which preceded the Palmer patent, arches must have been produced between the crimps, but those arches were deliberately eliminated and the connecting links between the crimps were made flat. The arches were no discovery. Nor was the

combination of the arch and crimp a discovery or new to the art. The testimony of Lippincott, Dobson, Guess and Kaye (R. 213) was to this effect. Lippincott, Dobson and Guess were in no wise connected with this case and were experts with long experience in the manufacture of screens. Lippincott has been connected with the Roebling Company for 47 years in various capacities, and is the most expert man on this matter in their employ. He testified, "The crimping of the wire in a flat top type naturally produces an arch when you do not employ dies to prevent" (R. 140). "That arch, whether a natural arch as a result of coiled wire, or an arch produced by the crimping, was known to the manufacturers of woven wire screens prior to the date of my prints. This bow or arch is a natural result of crimping unless something is done to prevent it. We knew of its existence and did something to prevent it for the reason just mentioned. Other manufacturers knew of it also, but we cannot say just how long previous to the design of our dies. Several years to my knowledge. That arch was removed deliberately by John A. Roebling's Sons Company in order to give longer life to the screen." Mr. Lippincott went on to testify that "At the date of this patent there was nothing new about it. It involves nothing that was not already known by myself at the date of this patent." He also stated that it did not involve any inventive genius or invention; that the Palmer patent did not contain any new and useful features which do not appear in the Potter patent, and that it did not contain anything new or useful that did not also appear in the Galloway patent.

Dobson (R. 152-153), who is president of the Ludlow-Saylor Wire Company, a very large manufacturer of woven wire screens and selling everywhere in the world, testified to the same effect. On cross examination he said (R. 155):

“There were completed woven wire screens containing all the features of the Palmer patent made prior to August 1932.”

Guess, who is manager of the Abbey-Scherer Company, manufacturers of woven wire screens, testified (R. 162):

“The Palmer patent plan of construction does not constitute an advance in the art of screen making. It constituted a retrogression. It does not perform any new function. It does not disclose any ingenuity or any result due to anything other than mechanical skill.”

### III.

**The claimed essential features of the Palmer patent were either known to the prior art or anticipated by the Potter and Galloway patents.**

Palmer claims that the patentable feature of his screen is the shallow crimp, coupled with the uniformly elongated arch. The crimp and the arch had long been known to the art. Defendants' Exhibit A-7, which is a picture of the grill screen placed in the Olympic Hotel in Seattle in 1924, shows a crimp and arch precisely like Palmer's patent. The testimony of Frank J. Seidelhuber (R. 224-226), who has been 44 years in the business in Seattle, is to the effect that he had made screens like that, including gravel screens, 30 or 40 years ago. He says he made them for gravel



screens, for elevator doors, for elevator enclosures and bank grills.

In Defendants' Exhibit A-36, which is a catalogue of the W. S. Tyler Co., of Cleveland, Ohio, manufacturers of all types of woven wire screen and cloth and probably one of the largest manufacturers in the United States (R. 249), there are advertisements of screens with shallow crimps and elongated arches. These crimps and arches are similar to the Palmer patent. They all happen to have the rectangular instead of the square mesh, but that is unimportant since the square mesh is not a distinguishing feature of the Palmer patent. That catalogue was copyrighted in 1927 and has been in the possession of Pacific Wire Works since 1931. The illustrations referred to may be found on the following pages: page 80, lower left hand corner; page 82, left hand side of page, upper corner; page 85 (4 illustrations) two on the right hand upper part of the page and two on the right hand lower part of the page; on page 86 on the left hand side is a group of two illustrations; on page 89 are three groups with two illustrations, and on page 90, there is a grouping of four screens that are not marked by numbers, but the one on the upper left hand corner is a rectangular screen, having a shallow crimp and elongated arch.

Also in evidence are the drawings of Mr. Lippincott, Defendants' Exhibits A-1, A-2 (R. 140), and the testimony of Lippincott (R. 142-148), Dobson (R. 149-155), Plaintiffs' Exhibit 9, Jones (R. 157), and Kaye (R. 203). Admittedly, the Potter and Galloway screens were manufactured prior to the Palmer patent.

The Potter screen contains the crimp and the connecting link between the crimps, and the Galloway patent contains the crimp and the arch or bump in the nature of a reverse crimp.

Again the lower court's finding is amply supported by the evidence.

#### IV.

##### **The Palmer screen lacks utility**

The statute requires that a device or process to be patentable must be both new and useful. The lower court held in this case that the Palmer screen lacked utility. We have previously dealt with the matter of utility in the discussion of the general desirability of the Palmer screen. It is a fair assumption that by utility the lower court meant *overall* utility. It is established, indeed, it is admitted by Palmer himself (R. 110) that the Potter screen will wear longer than the Palmer screen. It is claimed, however, for the Palmer patent that because of the rougher top surface it is more selective in its work of sifting rock and minerals. That a rougher surface was more selective was well known at the time. The Galloway patent had a rougher surface. It carried with it the correlative disadvantage of a lesser life (R. 109).

If the users problem at the time is the need of a rougher surface, any of the flat top type screens can be reversed. As has been discussed, it was also claimed that the Palmer screens secured a firmness through the lateral support of the transverse wire by the arch. The Potter patent, however, furnished much more

lateral support for every second wire and with increased pressure between the upper and lower wire in the connecting link achieved an overall result of as great lateral support for its individual wires as the Palmer screens. The Galloway patent admittedly furnished more lateral support than the Palmer (R. 109). As a matter of fact, the Palmer only provides its support in the smaller opening—none in the larger. In Plaintiffs' Exhibit 31, appellants themselves introduced as a sample of their screen a screen which furnishes no such lateral support. The Galloway patent even combined the rougher surface with the greater lateral support, but both the Galloway and the Palmer screens sacrificed wearing ability to secure any such advantages. Appellants attempted to demonstrate the lack of firmness in the Potter screen by introducing Plaintiffs' Exhibit 5. That screen, however, is not one manufactured by a Potter screen manufacturer. It is one which Palmer himself made for the special purpose of demonstrating its lack of firmness (R. 63). It is a very small mesh and is constructed of small wire. Appellees do not make so small a size in the flat top type. Any screen can be poorly made if it is constructed without sufficient pressure between the intersecting wires. An examination of this screen will show that it is obviously poorly made. It is distorted. It is not made according to the Potter patent, and its weaving is defective. In addition, in Palmer's attempt to demonstrate its weakness, no one knows what pressure he exerted on the screen. Plaintiffs' Exhibit 4, which he also used in the experiment, was also made for

illustrative purposes. Under such circumstances, his attempted experiment proved absolutely nothing.

On the contrary, Defendants' Exhibit A-32 is an Abbey-Scherer Potter screen. An examination will show that it is very firm and cannot be distorted. As previously pointed out on the question of desirability, except for the testimony of Palmer and his employee Essley, the evidence is all to the effect that if properly manufactured, the Potter screen is a tight screen and is efficient. The very best evidence of this is that it is still the one in general use, and it and the Galloway screens are being manufactured by the larger screen manufacturers today (See Palmer's own testimony, R. 87). The Potter patent has expired, but all manufacturers are striving to build flat top type screens along the lines of the Potter patent. Appellants themselves pointed out that the Potter patent is being featured in the Roebling catalogue of 1947. The testimony of all the independent manufacturers who testified also supported the finding of the court that the Palmer screen lacked overall utility.

## V.

**The description in the Palmer patent was not sufficiently definite to inform the public of the limits of the monopoly asserted.**

The statute, U.S.C.A. Ann., Title 35, Section 33, requires:

“\* \* \* a written description of the (claimed invention) and of the manner and process of the making, constructing, compounding and using it in such full, clear, concise and exact terms as

to enable any person skilled in the art or to which it is most nearly connected, to make, construct, compound and use the same \* \* \* and he shall particularly point out and distinctly claim the part, improvement or combination which he claims is his invention or discovery."

The lower court held that the claims of the Palmer patent did not contain a written description of the invention and discovery sufficient to point out particularly, and did not distinctly claim, the part or improvement or combination which Palmer claimed as his invention, so as to inform the public the limits of the monopoly asserted and so that the public may know which features may be used for manufacture without a license and those which may not. The court, in his oral opinion at the end of the case, said (R. 307):

"There is no explicit, certain formula or governing principle for the making of plaintiffs' patented curve or the crimp.

"It is not possible for a stranger, however skilled, to know with certainty how to employ plaintiffs' statement of principles for producing the Palmer patent crimps and arches. Likewise, a stranger to the patent cannot from any statement in the patent claims know exactly how to produce or to avoid producing the patented articles of the plaintiffs.

"Connected with the patent claims or evidence of principles involved in the making of plaintiffs' patented article, there is no exact mathematical or mechanical formula or description to guide the patented manufacture of a specific rock screen with exactly sized wire and with a definitely sized mesh of screen. There is to be



found in plaintiffs' patent claims and evidence no statement of exact depth of the crimps nor of controlling curvature angle or radius of the arches in the plaintiffs' patented screen."

The principle upon which the court relied is well established. In 40 American Jurisprudence, page 585, Section 86, it is stated:

"The purpose of the statutory requirement that the application for a patent shall contain a written description of the invention and discovery, and, in the case of a machine, the principle thereof, and shall particularly point out and distinctly claim the part, improvement or combination which the applicant claims as his invention or discovery is not only that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license, and which may not. The monopoly conferred by a patent for an invention does not extend beyond the invention described and explained as the statute requires."

This quotation is amply supported by *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 83 L. Ed. 34.

And in 40 American Jurisprudence, page 587, Section 87, it is stated:

"It is essential to the validity of letters patent that the specifications be full, definite, and specific.

"The purposes of requiring a definite and accurate description of the instrumentality or process are to apprise the public of what the

patentee claims as his invention, to inform the courts as to what they are called upon to construe, and to convey to competing manufacturers and dealers information of exactly what they are bound to avoid. Again, a correct and adequate description or disclosure of a claimed discovery is essential to the validity of a patent, for the reason that such a disclosure is necessary in order to give the public the benefit of the invention after the patent expires. Hence, if the description is so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent will be held to be void. The applicant is bound to specify the means or method he uses in a manner so full and exact that anyone skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes."

The evidence fully supports the findings of the court. The claims of the patent (R. 325-326) lay down nothing but vague and general statements. As the court said, they contain no formula; they do not indicate the depth of the crimp in relation to the size of the wire or the height or length of the arches, or any relationship between the crimps and the arches. When Palmer was on the witness stand, the court again and again asked him to state just how his screen was constructed—to give the court some formula or definite direction for it. Palmer was utterly unable to do so. After much pressing, Palmer told the court that the radius of his crimp was  $\frac{2}{3}$  of the radius of his wire. If this is intelligible and true, the

crimp is smaller than the wire, and the wire cannot fit down into the bottom of the crimp. Even if it be true, which appears unlikely, the patent claims contain no such specification. Clearly, the depth and shallowness of the crimp is determined by the sharpness or breadth of the plunger on the press and the arrangements of the female parts of the die. The patent claims contain nothing in this regard. The relation between the diameter of the wire and the depth of the crimp is obviously important. If the crimp is the full diameter of the wire in depth, the screen will not hold together because of lack of pressure between the intersecting wires. Appellees furnished their formula for this important relationship. The depth of their crimps is 84 to 92% the diameter of the wire (R. 187). Kaye (R. 247) testified that a mechanical formula could be stated for the relationship between the crimps and the arches. An examination of the claims would prove to the court that no one reading them could determine with any certainty how the Palmer screen could be constructed or how its alleged patented features could be avoided.

Counsel now claim that the question of the sufficiency of the description was not raised by the pleadings. It seems to us that it was raised by the allegations of the complaint (R. 3-4; V(b)) and the general denials of the amended answer (R. 9; I). Counsel urge that Rule 9c of the Federal Rules of Civil Procedure requires that denial to a pleading of compliance with conditions precedent must be in specific terms. The case cited to support their contention, *Providence Rubber Co. v. Charles Goodyear*,



76 U.S. 566, 19 L. Ed. 788, was decided in 1869. Rule 9c would appear to be intended to cover the pleading and denial of conditions precedent in actions covering contracts and deeds, and it can hardly be extended to cover the requirements in an application for a patent. See Moore's Federal Practice, 2nd Edition, Sec. 9.04, page 1913.

But even if not raised by the pleadings, the question was brought out clearly by the court on the first day of the trial (R. 102-103) and remained a live issue during the trial until the very end. Indeed, counsel voluntarily put his own client back on the stand in rebuttal (R. 272) and quizzed him at great length on this very point. The bulk of that rebuttal is concerned with it. This question was also thoroughly argued by both counsel immediately after the closing of the evidence and again upon the presentation of the findings and conclusions and decree. The point which the appellants are now raising was raised for the first time on the motion for a new trial (R. 47). The lower court held that it was too late to raise it and that the appellants had not been prejudiced.

The new Federal Rules of Civil Procedure, Rule 52(a), read as follows:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.”

Under this liberal rule the matter was clearly within the discretion of the lower court.

Under this rule, when the evidence is admitted as it was in this case without any objection whatever—indeed a large part of it was provided by appellants—it is not necessary to formally amend the pleadings. Appellants’ counsel seek to escape this sound rule of proper procedure by contending that such evidence was pertinent to the issues of infringement and the prior art. This contention seems unfounded, as the questions of the court were not directed to infringement or prior art, but solely to the formula or directions for making the Palmer screen in accordance with the Palmer patent. That appellants’ counsel fully understood this is shown by an examination of his own client when he voluntarily put him on the witness stand in rebuttal to testify on this very question. Under such circumstances, it cannot fairly be said that counsel did not have full notice of the issue of inadequate disclosure. Even if the evidence were admissible upon the issues suggested, appellants’ coun-

sel could have objected to its admission except for such limited purposes. Counsel was familiar with this procedure and utilized it during the trial (R. 251).

## VI.

**The screens being manufactured by appellee do not infringe the Palmer patent, if valid.**

The lower court so held. In four days of trial on challenge of infringement, appellants introduced only one of their screens (except an old worn out one which was of no use for the purposes of comparison with appellees' screens), the 1½" mesh. Appellees brought in a number of screens and also a number of their wires which had actually been used in the manufacture of screens. None of them showed any uniformly curved intersecting arches. Most of them showed nothing which could properly be termed an arch. All of them had flat connecting links between the crimps. So clear was the evidence that on the motion for a new trial appellants' counsel disclaimed in open court all claims of infringement except as to the 1½" mesh. On this sized mesh appellants introduced Plaintiffs' Exhibit 3, and then endeavored to compare it with Plaintiffs' Exhibit 2, a small screen manufactured by appellees similar to a particular screen produced in 1947. For some reason Palmer did not want one of recent manufacture (R. 55). The Palmer screen (Plaintiffs' Exhibit 3) shows a flattening of the arch. In that screen the arch obviously furnishes no support against lateral pressure. On the other hand, there are several other samples of appellees' screens of the same size. Take, for instance, Defendants' Exhibit A-21. That is a 1½"

mesh  $\frac{3}{8}$ " wire and shows clearly the flat connecting link. Plaintiffs' Exhibit 13 is a wire from a screen with the same dimensions, and it shows clearly the flat connecting link. In the  $1\frac{1}{2}$ " mesh, however, where the openings are small in relation to the size of the wire, the crimps are necessarily close together. To get the wire up and out of one crimp and down into a closely adjacent crimp, there must necessarily be present a curve upward and a curve downward, and the wire connecting the curve upward and the curve downward will be very short. At a hasty glance, there may appear to be a continuous curve or bow or arch. Can it be contended that this unavoidable bow can be patented so as to exclude all others from using it?

It should be remembered that appellees are not trying to copy appellants' screens. They are not attempting to infringe but to make a different screen under the principle of the Potter patent (R. 215). Their die is not designed "to produce any predetermined curvature"; "it is designed to take it out, not to put it in" (R. 206). Defendants' Exhibits A-30, A-31, A-33 and A-34 show this clearly. Appellees strive to take out any arch because they consider it undesirable (R. 207).

In addition to the fact that the physical shape and form of the wires in appellees' screens generally is different from that of appellants', as pointed out above, the evidence shows that the principle of construction relied upon is also different. Appellant Palmer stated (R. 70), and his patent application claims, that in appellants' screens the transverse wire is held in place because it fits into the curved part of the arch. In

appellees' screens the arch is removed in forming the wire and only the strong resistance to slipping created by the pressure, which the top wire exerts upon the bottom wire, is relied on to prevent displacement of the wires. In other words, the theory of appellants' patent and screen construction is that the force furnished by the arch itself against deformation or displacement of the arch holds the transverse wire in place. The theory of appellees' construction, in which the arch is removed, is that the resistance of the generally straight, but tightly-held-together wires to slipping across one another holds the transverse wires in place. This difference in construction was pointed out and explained by Mr. Kaye in his testimony (R. 187, 197, 203).

Palmer first testified that the radius of his crimp was  $\frac{2}{3}$  the diameter of his wire (R. 70). He was understood to be referring to the depth of the crimp. Later he increased the confusion of the court and everyone else by saying that the concave of the arch of the crimp was  $\frac{2}{3}$  of the radius of the intersecting wires (R. 276-277). If the depth of appellants' crimp is only about  $\frac{2}{3}$  the diameter of the wire, it is obvious that an arch will be necessary. The depth of appellees' crimp is 84 to 92% the diameter of the wire, or just enough to provide pressure by the top wire on the bottom wire and thus insure strong frictional force. To a layman the force relied upon by appellants in their patent and construction is often confused with the different force relied upon by appellees in their construction because of their similar relationship to the form of the wire. In fact, however, as



shown by the evidence, the two forces and two theories of construction are separate and distinct.

### CONCLUSION

In conclusion we commend to the court the very lucid oral decision made by the lower court at the conclusion of the trial (R. 306-309), and the court's ruling on the motion for a new trial (R. 44-48). We submit that the lower court's findings have ample support in the evidence on all of the issues determined by the court and that his decision should be affirmed.

Respectfully submitted,

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